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IN THE

Supreme Court of the United States

October Term, 1961

No. 730

ROBERT L. JONES and WASHINGTON STATE BOARD AGAINST DISCRIMINATION,

Petitioners,

v.

JOHN J. O'MEARA, DONNA A. O'MEARA, and THE SEATTLE REAL ESTATE BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

Petitioner Robert L. Jones prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Washington, entered in the above-entitled case on November 21, 1961. Petitioner Jones, in the interest of brevity, clarity and economy, will adopt pertinent portions of the petition of the Attorney General of the State of Washington filed herein on behalf of the Washington State Board Against Discrimination (hereinafter referred to as "The State Board").

Citations to Opinions Below

The opinion of the Superior Court (Tr. 34) is unreported and is printed in Appendix B of the State Board's

petition at page 65. The opinion of the State Supreme Court, printed in Appendix B thereto at page 32, is reported in 158 Wash. Dec. 791 and 365 P.(2d) 1.

Jurisdiction

The judgment of the State Supreme Court was entered on November 21, 1961 (State Board's Petition, p. 84). Rehearing was denied on November 21, 1961, p. 83, *id.* The jurisdiction of this Court is invoked under 28 USC. §1257(3).

Questions Presented for Review

The questions presented are:

(1) Whether a state statute prohibiting discrimination based on race, creed, color or national origin in the sale or leasing of publicly assisted housing contravenes the equal protection clause of the Fourteenth Amendment to the United States Constitution because the statute applies only to publicly assisted housing, and

(2) Whether all citizens of the United States, by virtue of the due process clause of the Fifth Amendment to the United States Constitution, have a right not to be denied the purchase of federally assisted housing on account of race or color, and if so, whether this state statute is a valid implementation of such right.

Statutory and Constitutional Provisions Involved

The statute at issue is the 1957 Amendment to the Washington Law Against Discrimination, Chapter 37, §§3 and 4, p. 108, RCW 49.06.030, printed in Appendix A to the State Board's Petition.

The constitutional provisions involved are:

(1) United States Constitution, Amendment 5, the portion reading as follows:

> "No person shall be . . . deprived of life, liberty, . or property without due process of law.

(2) United States Constitution, Amendment 14, printed in Appendix A to the petition of the State Board, p. 31.

(3) Washington State Constitution, Article I, §12, printed in Appendix A to the petition of the State Board, p. 31.

STATEMENT OF THE CASE

Petitioner Robert L. Jones is the Negro who was denied the purchase of Respondent O'Meara's house because of his race. He was denominated complainant-intervenor in this action in the trial court. Petitioner Jones adopts the statement of the case set out in the petition of the State Board and adds the following facts which are pertinent to the separate ground for review here advanced.

The undisputed testimony in the record (II St. 83-88*) is that the owners of the house, Respondents O'Meara, received substantial assistance from the United States Government in both the procurement and the contemplated sale of the house. They obtained a twenty-year first mortgage loan on extremely favorable terms because of the agreement of the Federal Housing Administration to insure repayment of the loan. Because of this FHA commitment their down payment was only 8% ($1,280.00) of the $16,000.00 purchase price and the interest rate on

*References to the verbatim transcript of the testimony in the trial court are in Volumes I, II and III of the Statement of Facts and will be referred to as "I St." or "II St." etc.

the loan was only 4½% per annum. Without this federal assistance they would have had to pay 33⅓% ($5,333.00) down and 5½% per annum interest. When Respondents O'Meara decided to sell the house in 1959, they again received federal assistance. They applied for and obtained an FHA appraisal of the house and an FHA commitment to insure the mortgage of a qualified purchaser of the house (II St. 83-88).

The petition of the State Board sets forth the stages and manner in which equal protection was drawn in question in the courts below (Petition of State Board, pp. 8 and 9). Petitioner Jones presented the alternative Fifth Amendment ground for upholding the statute in his written trial memorandum filed in the Superior Court during the trial (Supp. Tr. Trial Memorandum, pp. 9-11). The Superior Court judge specifically treated the Fifth Amendment issue in his memorandum opinion and ruled against petitioner (Petition of State Board, Appendix B, pp. 73 and 80). The issue was presented to the State Supreme Court in Petitioner Jones' brief on appeal below (Supp. Tr., Appt.-Intervenor's Brief, pp. 80-85). The Supreme Court of the State of Washington made no specific reference to the Fifth Amendment ground in its opinion, but necessarily rejected it in its holding that the statute is unconstitutional. After the entry of the judgment of the State Supreme Court on September 19, 1961, Petitioner Jones submitted a petition for rehearing based solely upon the ground that the State Supreme Court had failed to answer or otherwise dispose of the Fifth Amendment argument (Supp. R. Pet. for Rehearing). The petition for rehearing was denied without opinion on November 21, 1961.

REASONS WHY THE WRIT SHOULD BE GRANTED

The Application of Statutes Against Discrimination in Housing in Six Other States Is Also Limited to "Publicly Assisted" Housing.

The Court's determination of the questions here presented is of added importance because of the fact that the statutes against discrimination in housing now in effect in six states other than Washington use the same classification of "publicly assisted" housing.* The Washington State Supreme Court in this case decided that the use of this classification made the statute unconstitutional. Decisions of courts in two other states, however, have upheld the classification. (*Levitt & Sons, Inc. v. Division Against Discrimination*, 31 New Jersey 514, 158 A.(2d) 177 (1960), appeal dismissed for want of a substantial federal question, 363 U. S. 418, 80 S. Ct. 1257; *New York State Commission Against Discrimination v. Pelham Hall Apartment, Inc.*, 10 Misc.(2d) 334, 170 N.Y. Supp.(2d) 750 (1958)).

Equal Protection Under the Fourteenth Amendment

The petition of the State Board sets forth the reasons why *certiorari* should be granted to review the question of equal protection under the 14th Amendment. Petitioner Jones concurs in that argument. This petition concerns itself solely with the reasons for granting of *certiorari* to review the question of denial of due process under the Fifth Amendment. The State Board's Petition does not touch upon this latter question.

*Cal. Laws, 1959, Ch. 1681; Conn. Gen. Stat. §53-35 (1958); Mass. Acts 1959, Ch. 239; Minn. Laws, Ch. 428; N. J. Stat. Ann. §55: 14A-39.1; N. Y. Civil Rights Law §18-b3 (Supp. 1959).

Due Process Under the Fifth Amendment

The granting of *certiorari* to decide the question posed under the Fifth Amendment is not complicated by any question of whether the State Supreme Court rested its decision upon an alternative non-federal ground. If the Washington statute can be upheld as an implementation of the Fifth Amendment right, it necessarily disposes of the entire case.

Although this Court has decided that the due process clause of the Fifth Amendment prohibits racial discrimination by an arm of the federal government (*Bolling v. Sharpe*, 347 U.S. 497, 98 L.ed. 884, 74 S. Ct. 693 (1954)), it has not yet passed upon the question whether all citizens of the United States, by virtue of the due process clause of the Fifth Amendment, have a right not to be denied the purchase of federally assisted housing on account of race or color. Our position is that this right arises because the federal government's assistance to the owner of the house is so great and its involvement in the housing market is so extensive that the sale of the house is tantamount to "government action" in the eyes of the law.

The United States Government has a deep concern and involvement in the quality and adequacy of supply of housing for its citizens. Since 1935 the FHA alone has written mortgage insurance on more than five million homes and on multi-family rental and co-operative housing units of 800,000 families (U. S. Commission on Civil Rights, *With Liberty and Justice for All*, pp. 172-173 (1959)). The various other federal programs concerning housing are detailed in the State Board's Petition at pages 22 and 23. The purpose of the FHA program is

> ". . . to encourage improvement in housing standards and conditions and to exert a "stabilizing influence in the mortgage market." 8th Annual Report, Housing and Home Finance Agency, 1954, p. 83.

The purpose and effect of the federal government's involvement is to make it possible for millions of citizens to purchase and live in homes substantially better than they would otherwise be able to afford. Respondent O'Meara is one of those so benefited. He was able to purchase this home by paying only $1,280.00 down, whereas, without the FHA assistance, he would have had to pay $5,333.33. The interest rate on the unpaid principal of the loan he obtained was substantially less than what it would have been had he not had the FHA to stand with him. Moreover, when it came time to sell the house, Respondent O'Meara was able to offer a more readily saleable house by virtue of his having first obtained a new FHA appraisal of its value and a commitment by the FHA to insure a loan to any qualified prospective purchaser. Also, the United States Government has a direct concern in the sale of any house on which there exists an FHA-insured loan, for if the owner defaults the FHA must pay the lending institution the unpaid balance of the loan, and thereafter dispose of the house.

In these very substantial ways the United States Government is itself involved in the ownership and disposition of millions of houses throughout the country. Since the government is so involved and could not, if it were the sole owner, discriminate in the sale of such a house on the basis of race, creed, color, or national origin (*Bolling v. Sharpe*, 347 U.S. 497), any citizen who voluntarily asks

for and receives this substantial governmental assistance likewise cannot discriminate on those grounds.

All citizens, regardless of race, creed or national origin, contribute their tax dollars to the support of the FHA and other federal housing programs. It becomes an obvious denial of fundamental fair play—due process—for there to be a denial to any citizen, on the ground of race, creed or national origin, of an equal chance to purchase houses invested with such governmental support.

The courts have made it plain, in one area of activity after another, that segregation in which the federal or state governments play any part will not be countenanced. Cases involving segregation in public accommodations, schools, transportation, and employment have been decided and have helped in great measure to reduce racial discrimination inimical to our democratic society. Housing segregation tends to perpetuate all other kinds of discrimination. Unfortunately, it is the one area in which least progress has been made.

> "Housing and residence, however, have proved probably the most resistant of all fields to demands for equal treatment. The decade 1940-50 witnessed scant improvement in the housing conditions of non-whites, although the white population, in spite of the general scarcity of housing, registered significant gains in housing space per capita. Segregation barriers in most cities were tighter in 1950 than ten years earlier. In the years since 1950, the exodus of whites from cities to suburbs has permitted major expansion of minority living space in cities. Housing available to minority groups has increased substantially in many cities, both in amount and in quality, but the basic pattern of exclusion and segregation has changed little, if at all. The evidence indicates, on the whole, an increasing separation of racial groups as non-

> whites accumulate in the central city areas abandoned by whites and the latter continually move to new suburban subdivisions from which minorities are barred." Report of the Commission on Race and Housing *Where Shall We Live?*, 1958, p. 3.

The question as to when an act done by a private person becomes "government action" is difficult, but the concept appears to be an expanding one. The manager of a company town has been held to be acting as the state for the purposes of the Fourteenth Amendment. *Marsh v. Alabama*, 326 U.S. 501, 90 L.ed. 265, 66 S. Ct. 276 (1946). Or, if a private group conducts a primary the result of which is likely to determine the outcome of the election, that, too, has been held to be "government action" for the purposes of the Fourteenth Amendment. *Terry v. Adams*, 345 U. S. 461, 97 L.ed. 1152, 73 S. Ct. 809 (1953). The case of *Kerr v. Enoch Pratt Free Public Library*, 149 F. (2d) 212 (4th Cir.), *cert. denied* 326 U. S. 721 (1945), held that a library in the City of Baltimore, operated by a private board of trustees, could not discriminate on racial grounds because of the fact that the city contributed operating funds. A majority of the U. S. Supreme Court in *American Communications Ass'n v. Douds*, 339 U. S. 382, 94 L.ed. 925, 70 S. Ct. 674 (1950), put the matter as follows:

> "But power is never without responsibility. And when authority derives in part from government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by government itself." 339 U. S. at p. 401.

This Court has recently made plain the continuing evolution of the doctrine of "government action" in the case

of *Burton v. Wilmington Parking Authority*, 81 S. Ct. 856, 6 L.ed.(2d) 45, 365 U. S. 715 (1961), where it was held that the owner of a private restaurant located on ground leased from a public parking garage facility was, without reference to and in the absence of any anti-discrimination Act or other legislation of any kind, prohibited from discriminating against persons because of race, on the ground that his proprietary acts were "government action" because of the location of his restaurant.

A case squarely in point is *Ming v. Horgan*, 3 Race Relations Law Reporter 693 (1958) (California Superior Court). California at the time had no statute such as Washington's here in question. Plaintiff, a Negro, attempted to purchase a home from the seller who had FHA assistance. The seller refused on racial grounds, and the purchaser took the matter to court on the ground here urged, that the seller had such substantial governmental assistance that he could not constitutionally discriminate against purchasers on the ground of race. The trial court agreed and ordered the home sold to plaintiff.*

Respondent O'Meara voluntarily requested and obtained substantial assistance from the U. S. Government. His power of disposition of the house in question was derived in large measure from the aid the government afforded, and he should not now be permitted to act in such a way that the government itself could not in disposing of the property.

Viewed in this light, the act before us creates no new rights in petitioner Jones but merely provides him with

* *Ming v. Horgan* is discussed at length in 59 Columbia Law Review 782 (1959).

a speedy, inexpensive procedure by means of which to effect his U. S. Constitution-given right.

CONCLUSION

This Court has jurisdiction of this case. There is presented an issue of paramount importance. A reversal of the lower court's opinion will greatly facilitate progress toward the goal of a free and integrated society. We pray, therefore, that this petition be granted.

Respectfully submitted,

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